Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

(2)

No. 90-1976

In the Supreme Court of the United States

OCTOBER TERM, 1991

CENTRAL STATES MOTOR FREIGHT BUREAU, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly deferred to the Interstate Commerce Commission's conclusion that service provided by a motor carrier as part of a continuous shipment using both motor and rail transport is "related to a rail carrier" for purposes of 49 U.S.C. 10505(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 924 F.2d 1099. The decision of the Interstate Commerce Commission (Pet. App. 34a-60a) is reported at 6 I.C.C.2d 208.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1991. A petition for rehearing was denied on March 28, 1991. Pet. App. 32a-33a. The petition for a writ of certiorari was filed on June 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns two types of intermodal freight service, trailer-on-flatcar (TOFC or piggyback) service and container-on-flatcar (COFC) service. In TOFC operations, a motor carrier receives freight from the shipper and transports the freight in a trailer over a highway to a rail ramp, a railroad carries the trailer on a flatcar to a rail destination, and then a motor carrier hauls the trailer to the final destination. COFC service is similar, except that the container alone cannot be hauled on the highway, but first must be placed on a truck trailer; COFC service typically is used when at least one leg of the journey is by water. These types of services are favored because they allow shippers to take advantage of various modes of transportation without unloading and reloading the freight during the journey. See generally *ICC* v. *Texas*, 479 U.S. 450, 451-452 (1987); Pet. App. 2a-3a.

2. Pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, Congress gave the Interstate Commerce Commission (ICC) authority, in any "matters relating to a common carrier by railroad subject to [the jurisdiction of the Interstate Commerce Commission]," to exempt a transaction or service from regulation if the ICC determined that because of the limited scope of the transaction or service regulation would not be necessary to carry out the national transportation policy, would be an unreasonable burden, and would serve little or no useful public purpose. § 207, 90 Stat. 42 (codified at 49 U.S.C. 12(1)(b) (1976)).

Congress substantially broadened the exemption authority of the ICC in 1980 by passing the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895. Section 213 of that Act altered the exemption standards to require only a determination that regulation is not necessary to carry out the national

transportation policy and that *either* the transaction or service is of limited scope, *or* regulation is not needed to protect shippers from the abuse of market power. 94 Stat. 1912 (codified at 49 U.S.C. 10505(a)). Of pertinence to this case, Section 213 explicitly authorized the ICC to "exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement." 94 Stat. 1912 (codified at 49 U.S.C. 10505(f)).

3. Thereafter, the ICC in 1981 exempted the rail portion of TOFC/COFC movements, as well as the motor carrier portion to the extent performed by trucks owned or leased by railroads. *Improvement of TOFC/COFC Regulations, Ex Parte No. 230 (Sub-No. 5)*, 364 I.C.C. 731 (1981), aff'd *sub nom. American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981). This Court in *ICC* v. *Texas*, 479 U.S. 450 (1987), held that the ICC had properly applied the ruling in *Sub-No. 5* to exempt the motor-carrier portion of intrastate TOFC/COFC shipments. In 1987, the ICC extended the exemption to cover the motor-carrier portion of TOFC/COFC operations where the motor carrier sets joint rates with or is an agent of the railroad. *Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers), Ex Parte No. 230 (Sub-No. 6)*, 3 I.C.C.2d 869 (1987).

Finally, in 1989 the ICC extended the exemption to cover the motor-carrier portion of TOFC/COFC operations where the motor carrier is unrelated to the railroad. *Improvement of TOFC/COFC Regulations (Pickup and Delivery), Ex Parte No. 230 (Sub-No. 7)*, 6 I.C.C.2d 208 (1989). The ICC concluded that an intermodal shipment involving an interstate railroad falls within the exemption jurisdiction of Section 10505(a), because it is a "matter related to a rail carrier" and because the rail carrier is one that "provid[es] transportation subject to the jurisdiction of the [ICC]."

Pet. App. 39a-40a. The ICC also rejected the argument that the specific authority granted in Section 10505(f)[1] implicitly barred the ICC from granting any exemptions for intermodal services that fall outside the authority of Section 10505(f) because they are not provided by a railroad. The ICC explained:

> [T]he statutory framework indicates that Congress intended to set up a broad "related to" standard in § 10505(a) that would embrace all services that *might* be appropriate for exemption, and also to identify in § 10505(f) a narrower category of services "provided by" rail carriers as examples of matters that *should* be candidates for exemption. * * * Thus, the fact that pickup and delivery operations not provided by railroad do not qualify for exemption under § 10505(f) is immaterial to whether they qualify under the "related to rail" language of § 10505(a).

Pet. App. 40a.

4. Petitioners sought review in the United States Court of Appeals for the District of Columbia Circuit, and that court affirmed. Relying on *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court noted that it would accept the ICC's interpretation "so far as it is based on a permissible construction of the relevant statutory provisions," Pet. App. 6a, and that it would refuse to uphold any interpretation "inconsistent with congressional intent clearly expressed in the language and structure of the statute," *id.* at 7a (internal quotation marks omitted). Turning to Section 10505(a), the court "ha[d] little difficulty" in concluding that the ICC correctly had determined that pickup and delivery services provided by motor

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[1] That subsection provides: "The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement."

carriers as part of a continuous TOFC/COFC shipment are "related to a rail carrier" within the meaning of Section 10505(a), explaining that "[t]he very point of the motor carrier pickup and delivery services at issue is to allow shippers to take advantage of the efficiencies that rail TOFC/COFC offers." Pet. App. 7a.

The court of appeals rejected petitioners' argument that the explicit grant in Section 10505(f) of authority to exempt rail-provided services precludes an interpretation of Section 10505(a) as granting authority to exempt services not provided by a rail carrier. The court noted that it was evaluating this argument under "the first step of *Chevron* analysis, * * * using 'traditional tools of statutory construction' [to determine] whether Congress has 'directly spoken to the precise question at issue.'" Pet. App. 11a (quoting *Chevron*, 467 U.S. at 843 n.9, 842). Applying this standard, the court of appeals concluded that Congress had not spoken to the issue, because "[n]owhere in section 10505 did Congress explicitly address motor TOFC transportation not provided by a rail carrier." Pet. App. 12a.

The court then turned to "the second step of *Chevron* analysis * * * , 'whether the agency's answer is based on a permissible construction of the statute.'" Pet. App. 14a (quoting *Chevron*, 467 U.S. at 843). Applying this standard, the court of appeals accepted the ICC's construction, principally because of its conclusion that the legislative history appeared to support the ICC's conclusion that Section 10505(a) was intended to authorize the exemption of all portions of TOFC/COFC service. The court noted that Section 10505(f) was added to affirm the ICC's authority by providing explicit authority for the rule the ICC had proposed to issue in *Sub-No. 5* (which had been initiated before the Staggers Act through an Advance Notice of Proposed Rulemaking). Accordingly, the court believed that "[i]t would be ironic * * * if we were to construe this same

section to bar the ICC from taking further steps consonant with the Commission's general powers under section 10505(a), and to prevent the Commission from coordinating its regulatory approach to the various segments of TOFC/COFC service." Pet. App. 19a.

Judge Silberman dissented, concluding that the specific authorization of exemption authority in Section 10505(f) precluded the court from finding any broader exemption authority in Section 10505(a). Pet. App. 24a-31a.

ARGUMENT

The court of appeals, properly applying the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), correctly upheld the ICC's interpretation of Section 10505(a). Accordingly, petitioners' contentions warrant no further review.

1. Petitioners' principal contention (Pet. 8-15) is that the court of appeals committed a "fundamental error" in its application of *Chevron* in failing to determine whether Congress addressed the "precise question at issue" before according deference to the agency's construction of the statute. To the contrary, Judge Ginsburg's opinion for the court of appeals carefully follows this Court's opinion in *Chevron* at each step of the way.

At the outset of the analytical portion of the opinion, the court explicitly noted that it would "not defer to an agency's interpretation of a purely legal issue where it is inconsistent with congressional intent clearly expressed in the language and structure of the statute." Pet. App. 7a (internal quotation marks omitted); compare *Chevron*, 467 U.S. at 842-843; *Immigration & Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987). When the court of appeals turned to petitioners' argument based on Section 10505(f), it first determined the nature of the

"precise question at issue," see Pet. App. 12a (quoting *Chevron*, 467 U.S. at 843): whether "Congress has 'directly' and 'unambiguously' expressed its intention regarding ICC deregulation of motor TOFC transportation that is not provided by a rail carrier," Pet. App. 12a (quoting *Chevron*, 467 U.S. at 842, 843). In analyzing this question, the court of appeals noted that Section 10505(f) addresses only "TOFC transportation that *is* provided by a rail carrier." Pet. App. 12a. It then explained:

> While [Section 10505(f)] * * * might * * * be interpreted to limit th[e] otherwise broad authority [granted in Section 10505(a)] by implication, the permissive wording of subsection (f) bears an alternative interpretation: Congress might have intended simply to identify continuous intermodal movement provided by a rail carrier as a particularly appropriate candidate for exemption under Section 10505(a).

Pet. App. 12a-13a. The court also pointed out that other subsections of Section 10505 explicitly did limit the authority granted in Section 10505(a), and concluded that the failure of Section 10505(f) explicitly to limit the authority granted by Section 10505(a) strongly suggests that Section 10505(f) was not intended to limit Section 10505(a). Only *after* this statutory analysis did it conclude that the statute is ambiguous and thus that it was appropriate to defer to the ICC's interpretation. Pet. App. 14a.

Petitioners' real complaint with this analysis is not that it was insufficiently rigorous, but that it failed to result in the reading of the statute that they sought. Nothing in the court of appeals' opinion suggests that it misapplied the directives of this Court's decision in *Chevron*. Although petitioners correctly assert (Pet. 11-12) that it is not always clear exactly how *Chevron* should apply to the facts of particular cases, the court of appeals' application of *Chevron* in this

case raises no question of general significance and conflicts with no decision of any other court of appeals.[2] Accordingly, there is no reason for this Court to review the court of appeals' application of *Chevron*.

2. Petitioners also contend (Pet. 14-21) that the court of appeals' interpretation of Section 10505 is incorrect. At the outset, we note that the decision of the court of appeals is consistent with the only other decision that has considered a related question. See *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115, 1120-1121 (5th Cir. 1981) ("the source of the Commission's authority to grant exemptions is found in section 10505(a) and not in section 10505(f), which simply singles out continuous intermodal movement as an appropriate candidate for the exercise of the Commission's section 10505(a) exemption authority"). In any event, none of petitioners' arguments casts serious doubt on the conclusion of the court of appeals that the statute is ambiguous and that the interpretation of the ICC is permissible.

Petitioners argue first (Pet. 16) that the ICC's interpretation violates the canon "that all parts of a statute, if at all possible, are to be given effect," contending that the court of appeals' reading leaves Section 10505(f) completely ineffective. This is wrong, though, because, as the court of appeals acknowledged, Section 10505(f) was included in the statute to make clear beyond any doubt that the ICC had authority to deregulate a particular type of traffic that the ICC was examining at the time Section 10505(f) was enacted, and to particularly encourage the exercise of that authority. See Pet. App. 16a-19a. By recognizing the ICC's clear

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[2] Petitioners imply (Pet. 13) that the decision is in tension with statements in *Public Service Co.* v. *FERC*, 832 F.2d 1201, 1225 (10th Cir. 1987), and *United States* v. *Board of Trustees for Univ. of Alabama*, 908 F.2d 740, 747 (11th Cir. 1990). But petitioners do not, and cannot, claim that these variations in verbal formulation have led to a conflict of decisions.

authority to exempt rail-provided TOFC/COFC service, the court of appeals' reading gives the subsection the effect Congress intended.

Petitioners next contend (Pet. 17) that Section 10505(a) cannot sensibly be applied to motor carrier-provided TOFC/COFC segments, because the National Rail Transportation Policy gives the ICC "no criteria * * * to apply in making its exemption determination." This argument ignores the close relationship between the motor and rail portions of TOFC/COFC travel. Deregulation of motor carrier-provided TOFC/COFC traffic is closely related to the National Rail Transportation Policy, because that traffic fills an integral role in the market for rail freight services, by making those services available at competitive rates to customers who cannot deliver their freight to rail stations. Thus, it makes perfect sense for the ICC to decide whether to deregulate motor carrier-provided TOFC/COFC service by reference to the National Rail Transportation Policy, just as Congress directed in Section 10505(a).

Finally, petitioners argue (Pet. 18-21) that the legislative history of Section 10505(a) suggests that it is strictly limited to "rail matters" and that Congress intentionally declined to extend the ICC's exemption authority to matters that involve only motor carriage. But this legislative history is entirely consistent with the ICC's interpretation, because the ICC has not predicated its authority on the existence of motor carriage, but rather on the presence of a "rail carrier" that provides "transportation subject to the jurisdiction of the [ICC]." Given the presence of a rail leg in every TOFC/COFC shipment, this traffic falls squarely within the literal range of Section 10505(a)'s authority.

At the heart of this case is petitioners' general disagreement with the ICC's interpretation of its statutory mandate. This Court's decision in *ICC* v. *Texas*, 479 U.S. 450 (1987), rejected a similar argument that Section 10521(b)(1) limited

the ICC's authority to deregulate motor-carrier service. The Court's comments in that context bear equal force here:

> The [Staggers Rail Act] was a response to the concern that differing state and federal standards applying to the industry and excessive governmental regulation by both federal and state authorities had contributed to the financial difficulties of major railroads. In its statement of rail transportation policy, Congress unambiguously expressed its interest in allowing free competition, to the maximum extent possible, to govern the financial health of the railroad industry. * * * Even if the question of the extent to which [another portion of the statute] restricts the Commission's power under § 10505 in these cases were in doubt, the statutory statement of policy priorities would lead us to agree with the ICC's view that the ambiguity should be resolved in favor of competition.

479 U.S. at 460-461. Because the ICC's decision fully implements Congress's clearly-expressed policy preferences, the decision of the court of appeals upholding the ICC's interpretation merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20652